SAUL HAMID PAKIR MOHAMED

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL REVISION NO. 53-8-87]
4 JUNE 1987

CRIMINAL LAW AND PROCEDURE: *Remand proceedings- Arrest/remand - Whether an arrested person has the right to be represented by Counsel in remand proceedings - Counsel denied right to speak on behalf of suspect - Object of producing an arrested person before a Magistrate for a remand Order.*

CRIMINAL LAW AND PROCEDURE: *Revision - Judge calling for record of proceedings before an inferior Court - Magistrate/President authorises or refuses to authorise detention of arrested person - Whether an order made by Magistrate/President in remand proceeding in Chambers is a "Court" within the meaning of s. 323 Criminal Procedure Code - Jurisdiction to entertain this provision.*

The applicant was remanded in police custody at the Pulau Tikus police station pursuant to s. 117 of the Criminal Procedure Code. He was to be produced before the Magistrate for further remand on 25 March 1987. The applicant had expressed the desire that Mr. Asamaley, an advocate & solicitor be retained to oppose the application for further remand.

On 25 March 1987 the applicant was taken into chambers of the President, Sessions Court and accompanied by the investigating officer and Mr. Asamaley. The President enquired at to why Mr. Asamaley was present. He replied that he wished to be heard upon the application by the police for further order of remand. The President replied that "Counsel has no right to speak on behalf of suspect at this stage and is asked to leave". The President did not ask the investigating officer if he had any objection. Mr. Asamaley accordingly withdrew from the President's chambers. The President granted the investigating officer's request for further remand until 29 March 1987 only.

Held:

[1] The object of requiring an arrested person to be produced before a Magistrate for the purpose of obtaining a remand order is to enable the Magistrate to see that the remand is necessary and also to enable the prisoner to make any representations he may wish to make in the matter. There is authority for saying that an arrested person is entitled to be represented by Counsel in remand proceedings (under s. 167 of the Indian Criminal Procedure Code which is equivalent to s. 117 of our Criminal Procedure Code).

[2] Therefore, an arrested person has a right to be represented by a legal practitioner under remand proceedings before a Magistrate under s. 117 of the Criminal Procedure Code, unless the police can discharge the onus of satisfying the Magistrate that to allow him to exercise that right would result in undue interference in the course of investigation. The Court failed to see how they can discharge that onus by the simple unsworn *ipse dixit* of the police officer. The police will have to adduce evidence sufficient to convince a legal mind that there are substantial grounds to support their objection.

[3] A Magistrate or President who makes an order authorising or refusing to authorise the detention of an arrested person pursuant to s. 117 of the Criminal Procedure Code, he does so in an exercise of a judicial function, it is an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others.

[4] The Court has no hesitation in holding that when a Magistrate or President exercises powers under s. 117 of the Criminal Procedure Code he does so as an Inferior Criminal Court within the meaning of s. 323 of the Criminal Procedure code. The word "Court" does not necessarily mean "Open Court", it may include jurisdiction exercised in chambers.

[5] It is manifestly clear, from the record of the proceedings in the Court below that the President adhered firstly, in peremptorily excluding Counsel merely on the ground that Counsel had no right to be heard, and secondly, in not recording his reasons for extending the order for remand as required under the explicit provisions of s. 117(iii) of the Criminal Procedure Code.

Cases referred to:
R. v. Local Government Board [1902] 2 Ir R. 373
Chong Fook Kam & Anor. v. Shaahul & Ors. [1968] 2 MLJ 50
Ooi Ah Phua v. Officer in Charge, Criminal Investigations Kedah/ Perlis [1975] 2 MLJ 198
Hashim bin Saud v. Yahya bin Hashim & Anor. [1977] 2 MLJ 116
Quinn v. Leathem [1901] AC 495
Balakrishna v. Emperor [1931] AIR Lah. 99
In Re Llewelyn Evans [1930] AIR Lah 95
Sundar Singh v. Emperor [1930] AIR Lah 945
Ramli bin Salleh v. Insp. Yahya bin Hashim [1973] 1 MLJ 54

Legislation referred to:
Criminal Procedure Code ss. 2, 117, 117(iii), 167, 255, 323
Evidence Act 1950, ss. 119, 159, 160
Federal Constitution, art. 5(3)

Other source referred to:
Soonawala on Bails, 1968, Edn., p. 333

For the applicant - Karpal Singh (V. Sithambaram and Asamaley with him); M/s. Asamaley & Co.
For the public prosecutor - Mohd. Bazain bin Idris, DPP

JUDGMENT

Edgar Joseph Jr J:

The short but ever recurring and important point of law which arises in this revision may be stated shortly thus:

Has an arrested person the right to be represented by a legal practitioner in remand proceedings under s. 117 of the Criminal Procedure Code ("the Code")?

All references to sections hereinafter appearing are, unless otherwise stated, to the Code.

Before I embark upon a consideration of the question posed, I should, I think, remind myself of the fundamental proposition that the Court should always be jealous to ensure that the exercise of any judicial power falls within the parameters of the provisions of written law or within its inherent jurisdiction. This must be so for it is an unwritten maxim that the judicial animal being ever voracious should be kept to a restricted diet. Accordingly, the very first question I must ask myself (which incidentally was not raise before me) is whether I had the jurisdiction to entertain this revision having regard to my powers under s. 323 of the Code which provides as follows:

> 323. (i) A Judge may call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.
>
> (ii) Orders made under ss. 97 and 98 are not proceedings within the meaning the meaning of this section.

Most particularly, the question which arises here is whether a Magistrate or President who authorises or refuses to authorise the detention of an arrested person pursuant to the provisions of s. 117 is an "inferior criminal Court" within the meaning of s. 323.

Now, s. 117 reads as follows:

> 117 (i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s. 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such Magistrate.
>
> (ii) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to committal for trial by the High Court. [Am. Act A324]
>
> (iii) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

The word "Court" is defined in s. 2 to mean the High Court, a Sessions Court or a Court of the Magistrate of any class, as the context may require. The expression "inferior criminal Court" is not defined in the Code but I find no difficulty in dividing Courts into superior and inferior Courts. Superior Courts being those which are not subject to the control of any other Court except by way of appeal; such Courts in this country would be the High Courts of Malaya and Borneo. The inferior Courts would therefore include the Sessions Court and the Magistrate's Court.

I have no doubt that when a Magistrate or a President makes an order authorising or refusing to authorise the detention of an arrested person pursuant to the provisions of s. 117 he does so in exercise of a judicial function for it is an act done by a competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others (*R. v. Local Government Board* [1902] 2 Ir R 373). I note that in *Chong Fook Kam & Anor. v. Shaahul & Ors.* [1968] 2 MLJ 50, Suffian LP had occasion to observe, although in a different context, that "an order of a Magistrate authorising the detention of the arrested person beyond the period of 24 hours made under s. 117 is a judicial act and cannot found a claim for damages against the Magistrate". Further, "Court" does not necessarily mean "open Court"; it may include jurisdiction exercised in chambers.

I have, therefore, no hesitation in holding that when a Magistrate or President exercises powers under s. 117 he does so as an inferior criminal Court within the meaning of s. 323.

I must now return to the question of law posed in the opening paragraph of this ruling.

Now, the facts which have given rise to this application fall within a short compass and I would state them thus: On the night of 24 March 1987, Mr. Asamaley, advocate and solicitor, was at home when the telephone rang. The caller was on Encik Pakir Mohamed who said that his son had been arrested by the police three days previously, was then remanded in police custody at the Pulau Tikus police station pursuant to the order of the Registrar, Sessions Court (a Second Class Magistrate), and would again be produced before the Magistrate the next day. He added that his son had expressed the desire that Mr. Asamaley be retained on his behalf to oppose the application for further remand. Mr. Asamaley agreed to this.

a And so, on the morning of 25 March 1987, shortly after Mr. Asamaley arrived at the precincts of the Court, he saw his client being brought to Court by the investigating officer, one Inspector Abdul Fatah bin Abdul Rahaman and another police officer. Mr. Asamaley then approached them and introduced himself as the solicitor who had been retained on behalf of the arrested person. He then enquired of Inspector Fatah as to the reason for his client's arrest but received no reply. At this point, the arrested person confirmed that he wished *b* Mr. Asamaley to oppose the application for further remand.

What happened next was this: the arrested person was taken into the chambers of the President, Sessions Court, by Inspector Fatah who was accompanied by his colleague. Mr. Asamaley accompanied them into the chambers. On seeing this, the President enquired as to why Mr. Asamaley was present and received the reply that he wished to be heared upon the application by the police for a further order of remand. Upon being queried by the *c* President as to whether he had a right of audience in remand proceedings, Mr. Asamaley made a short submission which, however, did not commend itself to the President who then ruled, without asking Inspector Fatah if he had any objection, "Counsel has no right to speak on behalf of suspect at this stage and is asked to leave."

Mr. Asamaley accordingly withdrew from the President's chambers and what happened up *d* to then and thereafter, at the remand proceedings may, for the sake of clarity and convenience, be described simply by reproducing the note of the proceedings made by the President which reads:

> Insp. Fatah has explained the action taken as proposed.
>
> Mr. Asamalai, advocate & solicitor, for suspect, applies to be given a chance to address so *e* that remand period be not extended or reduced.
>
> **Ruling**: Counsel has no right to speak on behalf of suspect at this stage and is asked to leave.
>
> Suspect is informed of decision and of request by police.
>
> Suspect says he has been framed by complainant and his friends who made false report *f* against him.
>
> Suspect says he assists his father in his business near his place of work.
>
> Says he has made a police report about these matters.
>
> **Decision**: Suspect is allowed to be remanded until 29 March 1987 only.

I note, in passing, that the President did not record his reasons for making the order for *g* remand although s. 117(iii) enjoins him so to do. However, nothing turns on this having regard to the question raised in this revision, so the point need not detain us.

One begins by a consideration of Article 5(3) of the Constitution which reads:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

h

Clearly, the rights guaranteed under Article 5(3) are threefold; namely, (a) the right to be informed of the grounds of arrest, (b) the right to consult Counsel, and (c) the right to be defended by a legal practitioner of one's choice.

As to the right to consult Counsel, it would appear, at first glance, that this is a right which is unqualified since it is difficult to conceive of a right which one cannot exercise. However, *i* there is high authority to the contrary. So, in *Ooi Ah Phua v. Officer In Charge, Criminal*

Investigations Kedah/Perlis [1975] 2 MLJ 198. 1F where the question was whether the refusal to allow the appellant to consult his Counsel during the period of police detention in spite of the Magistrate's order was a breach of his constitutional right, Suffian LP said:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

Similarly, in *Hashim bin Saud v. Yahya bin Hashim & Anor*. [1977] 2 MLJ 116 where the same question arose, Raja Azlan Shah FJ (as he then was) referred to the above quoted passage in the judgment of Suffian LP in *Ooi Ah Phua's case (ibid)* with approval, but added:

> We therefore did not agree with the proposition of law propounded by the learned Judge that the right to Counsel could only be exercised after the completion of the period of police investigation under s. 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a Court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

And, a little further down his Lordship added,

> **The onus of proving to the satisfaction of the Court that giving effect to the right to Counsel would impede police investigation or the administration of justice falls on the police.**
> (Emphasis supplied.)

However, upon the facts, the Court was satisfied that good and sufficient reason had been established by the police as to why such right could only be exercised after the period of police investigation was completed under s. 117.

A careful reading of the judgments in *Ooi Ah Phua & Hashim bin Saud (ibid)* will show that the Courts were there concerned with the question whether an arrested person had the right to consult Counsel during the period of police detention pursuant to the Magistrate's Order under s. 117; in other words, whilst he is **at the police station**.

So, the question whether an arrested person is entitled **to be represented by Counsel** in remend proceedings **before a magistrate** under s. 117 did not arise acutely for decision in those cases. I am thus remained of Lord Halsbury's famous dictum in *Quinn v. Leathem* [1901] AC 495 that:

> Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions of Judges must be understood in relation to the subject matter before the Court; see *Moss v. Gallimore* [1779] 1 Doug. KB 279 @ 283; *Hood v. Newby* [1882] 21 Ch. D. 605 CA.

Now, the object of requiring an arrested person to be produced before a magistrate for the purpose of obtaining a remand order is to enable the magistrate to see that the remand is necessary and also to enable the prisoner to make any representations he may wish to make in the matter. (see *Balakrishna v. Emperor* [1931] AIR Lah 99). Since the average prisoner may be safely presumed to be ignorant of the principles upon which the magistrate exercises his discretion in such matters, is not likely to be at his best when he comes straight from prison and may be under severe anxiety, mental strain, inarticulate or discursive and, therefore,

quite unable to present his own case, it must follow that legal representation on such occasions will most probably be a great advantage to him. Indeed, in India there is authority for saying that an arrested person is entitled to be represented by Counsel in remand proceedings under s. 167 of the Criminal Procedure Code (which is equivalent to s. 117 of our Code): see *In Re Llewelyn Evans* [1930] AIR Lah 95 and *Sundar Singh v. Emperor* [1930] AIR Lah 945.

The learned Deputy has argued that it would impede investigations if the arrested person were allowed legal representation in remand proceedings before a magistrate because then there would be disclosure of the evidence the police had up to this time collected as well as disclosure of potential sources of evidence to be collected. The reasoning behind the learned Deputy's argument is, of course, based upon the presumption that all arrested persons are guilty. But it goes further and assumes a general inclination of arrested persons and, by inference, defence Counsel, to stubborn bribery and perjury, to intimidate witnesses, to fabricate defences, to procure perjured testimony and to indulge in other illegal activities in order to secure acquittals. Thus, accurate finding becomes less likely. Needless to say, as a general statement about the defence Bar and accused persons generally, this is a thoroughly unacceptable indictment.

As for the risk of premature disclosure to the defence, it is obvious that under s. 117, a Magistrate may, on the mere perusal of the entries in the police diary relating to the case, authorise the detention of the arrested person in custody for a term not exceeding 15 days in the whole. Moreover, the arrested person cannot call for or inspect the diary unless the police officer concerned refers to it for purposes of ss. 159 or 160 of the Evidence Act 1950, in which case, only such parts of it as are referred to shall be shown to the arrested person: s. 119. Consequently, subject to the very limited exceptions mentioned, neither the arrested person nor his Counsel (if present), would have any means of knowing of the entries in the diary unless of course, the Magistrate or the police officer makes disclosure thereof during the proceedings - events I would regard as most unlikely.

However, the matter does not rest there ,for the anxieties of the prosecution spring from another source; the right to represent the arrested person must, of necessity, carry with it the right to interview him "not within the hearing of anyone for communications between Solicitor and Client are privileged though it should be within the sight of the police" (per Barakbah J as he then was) in *Ramli bin Salleh v. Insp. Yahaya bin Hashim* [1973] 1 MLJ 54, 56. So, the prosecution would say that this would afford the opportunity for distortion of the criminal process. To take up this point, I would suggest that to avoid the risk of misconstruction, Counsel be permitted to interview the arrested person only if and when Counsel is given leave by the Magistrate to represent the arrested person in the proceedings under s. 117.

The conclusion at which I have arrived is that generally an arrested person has a right to be represented by a legal practitioner in remand proceedings before a magistrate under s. 117 unless the police can discharge the onus of satisfying the magistrate that to allow him to exercise that right would result in undue interference with the course of investigation. I fail to see how they can discharge that onus by the simple unsworn *ipse dixit* of the police officer. The police will have to adduce evidence sufficient to convince a legal mind that there are substantial grounds to support their objection. I am fortified in my conclusion by the following passage in the judgment of Bhide J in *Sundar Singh v. Emperor* (*ibid*) approved by Suffian LP in *Ooi Ah Phua's* case (*ibid*)*:*

> The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must of course be prepared to support their action on substantial grounds.

It follows, therefore, that in all cases, the police should, upon request, co-operate by keeping relatives of the arrested person or his Counsel informed of the dates, times and the name of the magistrate from whom remand is going to be sought so as to enable Counsel to appear before the magistrate and apply to be heard. (see *Soonawala on Bails* 1968 Edn. p. 333).

Looking back, I should perhaps add that I have not overlooked s. 255 which provides:

> Subject to the provisions of s. 8, and to any express provision of law to the contrary, every person accused before any Criminal Court may of right be defended by an advocate.

It is true that s. 117 refers to the person arrested as "the accused person". In my view, however, having regard to the context "every person accused" within the meaning of s. 255 means every person accused who has been charged in Court, whereas "the accused person" within the meaning of s. 117 means only an arrested person in respect of whom the police have grounds for believing that an accusation or information is well founded. I am fortified in this conclusion by the fact that s. 117 comes under Chapter XIII which is entitled "Information To The Police And Their Powers To Investigate", whereas, s. 255 comes under Chapter XXIV which is entitled "General Provisions As To Enquiries And Trials". Furthermore, the use of the word "defended" in s. 255 is, in my opinion, not without significance. One does not readily conceive of the idea of an accused being "defended" until and unless a formal charge has been preferred against him.

As for the particular circumstances of this case, it is manifestly clear, from the record of the proceedings in the Court below, that the President had erred; firstly, in peremptorily excluding Counsel merely on the ground that Counsel has no right to be heard, and secondly, in not recording his reasons for extending the order for remand as required under the explicit provisions of s. 117(iii) of the Code.

I was told, during the argument, that the arrested person in this case, has already been charged with an offence of robbery in contravention of s. 392 of the Penal Code, that he has been admitted to bail and that his case is pending trial. In the circumstances, I need make no formal order. Counsel, however, intimated that nevertheless a ruling on the question of law raised was desirable and it is out of deference to such request that I have made the same.

Also found at [1987] 2 CLJ 257